No. 00-563

IN THE

Supreme Court of the United States

WINIFRED N. COTTER, ET AL.,

Petitioners,

v.

MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In its present posture, the only question presented by this case is whether, in a civil rights suit alleging that the defendants unconstitutionally considered race in making promotions, intervention as of right should have been allowed to two minority police officers, whom the petitioners allege were promoted "solely because of their race," and to a minority organization that for over twenty years has represented the interests of minority candidates for promotion within the Boston Police Department.

CORPORATE DISCLOSURE STATEMENT

The Massachusetts Association of Minority Law Enforcement Officers is a corporation that has no parent corporation and is not owned in whole or in part by any publicly held company.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 219 F.3d 31 and is reproduced at Petitioners' Appendix ("Pet. App.") 1a–14a. The decision of the district court, which was without opinion, is reproduced at Pet. App. 72a.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on July 17, 2000. The First Circuit denied a petition for rehearing and suggestion for rehearing en banc on August 10, 2000. The jurisdiction of this Court is invoked by the petitioners under 28 U.S.C. § 1254(1).

PROVISIONS AT ISSUE

Federal Rule of Civil Procedure 24(a)(2), which provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Respondents respectfully submit that the Fourteenth Amendment is not at issue in the present posture of this case.

STATEMENT

A. Prior Proceedings

Petitioners seek review of a judgment of the Court of Appeals for the First Circuit, reversing an order of the federal district court for the District of Massachusetts and remanding the case with directions to allow intervention as of right to respondents Massachusetts Association of Minority Law Enforcement Officers ("MAMLEO"), and Boston Police Department Sergeants Dennis A. White and Harold White (collectively, the "MAMLEO applicants" or the "MAMLEO intervenors").

Petitioners, eight officers employed by the Boston Police Department ("BPD"), commenced this action in federal district court on May 21, 1999, alleging that their constitutional rights were violated by the promotion to sergeant of three minority officers of the BPD (including the two individual applicants for intervention). Like the minority officers whose promotions they

challenge, petitioners each scored 84 on a promotional examination administered in October 1996 ("1996 Exam").

The initial complaint named as defendants the BPD; Paul F. Evans, the Commissioner of the BPD; Edward P. Callahan, Director of Human Resources for the BPD; and the Commonwealth of Massachusetts, Executive Office for Administration and Finance, Human Resources Division (the "HRD"). On July 29, 1999, the petitioners amended their complaint to name only two defendants, the City of Boston and James J. Hartnett, Jr., in his official capacity as the Personnel Administrator of the HRD.

On August 3, 1999, Hartnett moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the claims against him, which motion was denied by the district court on October 20, 1999. *See Cotter v. City of Boston*, 73 F. Supp.2d 62 (D. Mass. 1999).

On November 9, 1999, the MAMLEO applicants timely filed a motion to intervene as defendants. The existing defendants assented to the motion but the petitioners opposed it. Pet. App. 72a. The district court denied the motion on November 23, 1999, without making any findings in support of the order and without hearing oral argument or conducting an evidentiary hearing on the matter.

On December 30, 1999, MAMLEO timely noticed an appeal and filed with the district court a motion to stay the proceedings, pending resolution of its appeal. The defendant City of Boston assented to the motion to stay and defendant Harnett took no position on the motion. Although the petitioners advised MAMLEO that they would oppose the motion to stay, the district court denied the motion on January 5, 2000, prior to the filing deadline for the petitioners' opposition papers.

On January 14, 2000, the MAMLEO intervenors filed with the First Circuit a motion to stay pending appeal. Petitioners filed their opposition on January 26, 2000. On

February 8, 2000, the First Circuit denied the motion but established an expedited briefing schedule on appeal.

On July 17, 2000, the First Circuit vacated the district court's order and remanded the case with directions to allow intervention as of right to the MAMLEO applicants. *See* Pet. App. 14a. The First Circuit denied a petition for rehearing and suggestion for rehearing en banc on August 10, 2000.

The district court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(3) and 1343(4) because plaintiffs' claims arise under the Constitution and laws of the United States and because plaintiffs seek injunctive relief and damages for the alleged deprivation under color of state law of civil rights secured under the Constitution and Acts of Congress. Jurisdiction in the court of appeals was proper as an appeal from a denial of a motion to intervene as of right. *See* Pet. App. 4a (citing *Flynn v. Hubbard*, 782 F.2d 1084, 1086 (1st Cir. 1986)); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377-78 (1987).

B. Factual Background

1. MAMLEO's History Of Representing Minority BPD Officers

For the past 20 years, MAMLEO has played a crucial role in the integration of the BPD. Among other things, MAMLEO served as the class representative of "[a]ll present and future black sworn officers in the [BPD]," pursuant to a consent decree entered in 1980 in the federal case *Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, Civ. No. 78-529-McN ("Consent Decree"). Various provisions of the Consent Decree, including affirmative action goals and timetables for promotions to sergeant, were affirmed by the First Circuit on three separate occasions. *See Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, 973 F.2d 18 (1st Cir. 1992); *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991);

Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't, 780 F.2d 5 (1st Cir. 1985).

As the representative of minority BPD officers, MAMLEO has been allowed to intervene in cases challenging the use of affirmative action pursuant to the Consent Decree, as well as in cases involving the use of affirmative action outside the context of the Consent Decree. *See Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991) (allowing MAMLEO to intervene in case challenging promotions pursuant to Decree); *Boston Superior Officers Fed'n v. City of Boston*, 147 F.3d 13 (1st Cir. 1998) (allowing MAMLEO to intervene in case challenging affirmative action not mandated by Decree); *Boston Police Superior Officers Fed'n v. City of Boston*, Civ. No. 98-10800-GAO (allowing MAMLEO and individual officers to intervene in case challenging affirmative action not mandated by Decree); *Boston Police Dep't v. Abban*, Suffolk Superior Court No. 99-0223-A (allowing MAMLEO to intervene on appeal in civil service challenge to affirmative action).

2. The Promotions At Issue In This Case

On October 19, 1996, the HRD administered a promotional exam for the position of sergeant within the BPD ("1996 Exam"). On or about October 17, 1997, the HRD certified to the BPD a list of 69 candidates who had achieved the highest scores on the 1996 Exam.

On December 26, 1997, the BPD wrote to the HRD, stating its intent to promote three black officers who scored 84 on the 1996 Exam ahead of six white officers with scores of 85. *Cf. Superior Officers*, 147 F.3d at 24 (noting HRD's determination that, with respect to *1992* promotional exams, candidates who scored within three points of one another were "equally qualified"). The BPD stated that it was promoting the three black officers in order to ensure "compliance with current EEOC guidelines and applicable federal and state anti-discrimination laws." *See Superior Officers*, 147 F.3d at 21

(affirming BPD's determination that promotions in strict rank order would have supported inference of discriminatory impact under EEOC Guidelines). On January 15, 1998, the BPD advised the HRD of the effect that promotions made in strict rank order, without regard to race, would have on the racial composition of the sergeant workforce.

On February 2, 1998, the HRD advised the BPD that it did not accept the proffered justification for promoting three black officers with scores of 84 ahead of six white officers with scores of 85. Faced with the HRD's position, the BPD, in effect, capitulated. On June 8, 1998, the BPD asked the HRD to certify six additional test-takers as eligible for promotion. As a result, the BPD was able to promote all of the officers with scores of 85, as well as the three minority officers with scores of 84.

The petitioners, who also scored 84 on the exam, were not among those officers promoted to sergeant. They allege that their scores qualified them for promotion, but also allege that the minority officers with identical scores were promoted "solely because of their race."

ARGUMENT

The petition for writ of certiorari should be denied because the First Circuit correctly stated and applied the law governing intervention as of right, and because the questions presented for review by the petitioners are not properly before this Court.

1. Further review of the decision below is unwarranted because the First Circuit correctly stated and applied the law governing intervention as of right and because the decision below does not conflict with any decision of this Court or any other court of appeals on the same matter. *See* Supreme Court Rules 10, 11.

a. The only issue on appeal before the First Circuit -- from the only immediately appealable order in the case to date -- was whether MAMLEO and the individual applicants, Sgt. Dennis White and Sgt. Harold White, were entitled to intervene in this case as of right. As the First Circuit recognized, the merits of the case were not before it. Pet. App. at 3a (acknowledging same). The First Circuit correctly stated and applied the governing law in determining that MAMLEO and the individual applicants were entitled to intervene in this case in order to defend the use of racial criteria as a lawful measure to remedy discrimination within the BPD.

Federal Rule of Civil Procedure 24(a)(2), which governs intervention as of right, provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

A party timely seeking intervention as of right under Rule 24(a)(2) thus must demonstrate three things: "1) that it has a direct and substantial interest in the subject matter of the litigation; 2) that its ability to protect the interest may be impaired if it is not allowed to intervene; and 3) that its interest will not be adequately represented by an existing party." *International Paper Co. v. Inhabitants of the Town of Jay, Me.*, 887 F.2d 338, 342 (1st Cir. 1989) (citation omitted).

As a threshold matter, the First Circuit rejected the petitioners' argument that intervention should be denied on the ground that the MAMLEO applicants lack standing. The First

Circuit explained that, "in the ordinary case, an applicant who satisfies the 'interest' requirement of [Rule 24(a)(2)] is almost always going to have a sufficient stake in the controversy to satisfy Article III." Pet. App. at 5a (citing *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 n.4 (7th Cir. 1997)). Noting that "it may be that there are unusual cases where an intervenor could satisfy the interest requirement of Rule 24(a)(2) without having the stake in the controversy needed to satisfy Article III," the First Circuit concluded that no such "peculiar circumstances" were urged in this case and, therefore, there was no occasion for the First Circuit to consider "the abstract question whether an intervenor-defendant must show some separate form of standing." Pet. App. at 5a. Accordingly, the First Circuit turned to the question whether the MAMLEO applicants satisfied the requirements for intervention under Rule 24(a)(2). Pet. App. at 5a-14a.

As to whether the individual applicants claim "an interest relating to the property or transaction which is the subject of the action," Fed. R. Civ. P. 24(a)(2), the First Circuit concluded that the gravamen of the complaint "amounts to saying that their promotions were based on an unconstitutional decision or process, and to say that an officer has no interest in defending his own promotion would be to defy common sense." Pet. App. at 7a. The First Circuit added that, although the complaint does not ask that the promotions of the three minority officers be voided, "the plaintiffs do not make the final decision as to what relief should be afforded if the district court does find a constitutional violation." Pet. App. at 7a.

As to whether "the intervention applicants' ability to protect their interest 'may' be 'impair[ed] or impede[d]' if they are not allowed to intervene, Fed. R. Civ. P. 24(a)(2)," Pet. App. at 8a, the First Circuit concluded, "even a small threat that the intervention applicants' present promotions could be jeopardized would be ample reason for finding that their ability to protect their interest 'may' be adversely affected." Pet. App. at 8a (citing cases).

Regarding the adequacy of representation issue, the First Circuit held that, "[i]n this case, enough likelihood of conflict or divergence of interests exists to defeat any claim that 'the applicant's interest is adequately represented by the existing parties,' Fed. R. Civ. P. 24(a)(2)." Pet. App. at 9a.

Although it found more difficult the question whether MAMLEO, the organization, was entitled to intervene, the First Circuit determined under well-settled precedent that MAMLEO satisfied the requirements of Rule 24(a)(2). In the course of its analysis, the First Circuit recognized that, although a civil rights case involving employment "may be sparked by a particular episode, the decision may be likely to control an ongoing process within the department or agency for formulating rules for advancement and so predictably affect the interests of others who are already employed by the same institution and who will in turn be seeking advancement." Pet. App. at 12a-13a. Since a number of MAMLEO's members are likely to seek promotion to sergeant in the future, "the outcome of this case may very well determine how the [BPD] handles, and is allowed to handle, comparable situations almost certain to arise in the future, and the likely impact on other MAMLEO members seems to us substantial, predictable and far more concrete than some general interest in precedent." Pet. App. at 13a.

The First Circuit went on hold that MAMLEO satisfied all the requirements of Rule 24(a)(2), concluding that, "[i]f plaintiffs prevail and as a result the [BPD] is constrained to ignore race entirely in all future promotions, other MAMLEO members may well lose promotion opportunities" and that "the potential conflict between MAMLEO and the [BPD] on how best to defend the consideration of race in promotions is enough to show that the interest of MAMLEO members is not 'adequately represented by existing parties,' Fed. R. Civ. P. 24(a)(2)." Pet. App. at 13a-14a.

As the preceding section demonstrates, the First Circuit correctly stated and applied the law governing intervention.

Petitioners do not argue otherwise; nor do they demonstrate a conflict between the decision below and a decision of this Court or any other court of appeals on the issue of intervention. Rather, petitioners argue that the decision below somehow contravenes Article III standing doctrine and the Fourteenth Amendment standard for determining the lawfulness of race-conscious decisionmaking. None of the petitioners' arguments justify review by this Court of the First Circuit's decision, as discussed further below.

b. Petitioners' second question asks this Court to decide the question reserved in *Diamond v. Charles*, 476 U.S. 54 (1986) -- i.e., whether an applicant for intervention must demonstrate Article III standing. This question is not properly before this Court, however, as the First Circuit expressly did *not* decide whether an applicant for intervention must demonstrate Article III standing. *See* Pet. App. 5a; Supreme Court Rule 11.

i. This Court has stated that the authority to grant certiorari before a decision by a court of appeals is a "power not ordinarily to be exercised," *The Three Friends*, 166 U.S. 1, 49 (1897), and has long held that "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed," *Duignan v. United States*, 274 U.S. 195, 200 (1927) (collecting cases). *See* Supreme Court Rule 11. The cases to this effect are legion. *E.g.*, *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below") (citing *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999) (declining to address issues not sufficiently developed below for the Court to assess them); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to decide in the first instance an issue on which the trial and appellate courts did not focus)); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (declining to consider question addressed by neither the district court nor the court of appeals). As observed by one commentator, "[a] grant of certiorari before judgment denies the Court the benefit of court of appeals deliberation, and

in cases of special interest and contemporary importance may undesirably deprive the parties of the opportunity for reflection and adjustment of their own positions." 17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 4036 at 20-21 (1988).

ii. No exceptional circumstances are present in this case such as might warrant review by this Court of questions not yet decided in the first instance by the district court and the court of appeals. *See* Supreme Court Rule 11. Thus, to the extent that there is a conflict in the circuits regarding the question reserved in *Diamond v. Charles*, the occasion for resolution of that question by this Court is not presented by the decision below.

iii. In all events, the First Circuit correctly stated and applied the governing law, both in ruling that the MAMLEO applicants have standing, Pet. App. at 5a, 11a & n.3, and in determining that the MAMLEO applicants met the requirements of Rule 24(a)(2), Pet. App. at 6a-14a. Moreover, the petitioners have failed to demonstrate that this case presents an unusual circumstance in which the applicants for intervention "satisfy the interest requirement of Rule 24(a)(2) without having the stake in the controversy needed to satisfy Article III." Pet. App. at 5a. Because the First Circuit correctly held that the MAMLEO applicants have standing, a decision by this Court that applicants for intervention must demonstrate standing would not change the outcome of the decision below. The petitioners' question two therefore calls for an impermissible advisory opinion. *See Muskrat v. United States*, 219 U.S. 346, 362 (1911).

c. To the extent that the petitioners otherwise claim error in the First Circuit's intervention analysis, the petitioners' arguments are unavailing.

i. The petitioners erroneously contend that the First Circuit "specifically consider[ed] the individual circumstances of the individual members of the [MAMLEO] organization" in violation of this Court's decisions in

International Union v. Brock, 477 U.S. 274 (1986), and *Hunt v. Washington State Apples Advertising Comm'n*, 432 U.S. 333 (1977). Pet. Br. at 23-24.

Neither *Brock* nor *Hunt* held that organizational standing and the standing of individual members of the organization are mutually exclusive. Rather, the third prong of the three-part test for organizational standing applied in the *Brock* and *Hunt* cases merely requires that individual members of the organization seeking to establish standing must not be "'indispensable to proper resolution of the cause.'" *Hunt*, 432 U.S. at 343 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Applying these principles to the instant case, it could not be more clear that the First Circuit did *not* hold that the participation of individual MAMLEO members was "indispensable." Rather, the First Circuit appropriately considered the circumstances of Sgt. Dennis White and Sgt. Harold White in evaluating their individual applications for intervention. Pet. App. 7a-10a.

Even if this Court were to find that the First Circuit misapplied the law governing organizational standing, this would not justify further review of the decision below by this Court because the First Circuit properly stated the governing law. *See* Supreme Court Rule 10. Moreover, a decision by this Court concerning the First Circuit's organizational standing analysis would not change the outcome of the decision below – i.e., the presence of intervenors in the case -- as the organizational standing test does not apply to individuals and the First Circuit correctly held that the individual applicants were entitled to intervene as of right. Accordingly, such a decision would constitute an impermissible advisory opinion. *See Muskrat,* 219 U.S. at 362.

ii. The petitioners also erroneously assume that the Fourteenth Amendment strict scrutiny standard for determining the lawfulness of race-conscious decisionmaking somehow controls analysis of the intervention question. *See, e.g.*, Pet. Br. at 8, 16-17; 19-20; 27-28. As the First Circuit recognized,

however, the merits of the case are not before the court in determining a motion to intervene, *see* Pet. App. 3a, and the petitioners cite no authority for the proposition that the standard by which the merits of the case ultimately will be determined governs the intervention analysis. Because the First Circuit properly did not apply the Fourteenth Amendment strict scrutiny standard to the question whether intervention as of right should be granted, the decision below presents no occasion for further review by this Court.

2. Further review of the decision below is unwarranted because the petitioners' first, third, and fourth questions are not properly before this Court, as they exceed the scope of the only immediately appealable issue in this case -- whether the MAMLEO applicants should be allowed to intervene under the law governing intervention as of right -- and because these questions concern evidentiary and other issues related to the merits of the case that have not been decided in the first instance by the district court and reviewed by the court of appeals.

a. In their first question, the petitioners ask this Court to resolve a purported conflict in the circuits as to whether an intervenor can enlarge the issues beyond those that the original parties wish to litigate. Even assuming that there is a conflict in the circuits on this point, the question is not properly before this Court.

i. This issue was expressly *not* decided by the court of appeals. *See* Pet. App. 10a (declining to take a position on the issue). Thus, to the extent that there may be a circuit split on this issue, the question is not raised by the decision below. Because neither the district court nor the court of appeals has considered and ruled on the issue, petitioners' first question is not "ripe" for review by this Court. *See* Supreme Court Rule 11 and cases cited in section 1b, *supra*.

ii. Contrary to the petitioners' argument, as a factual matter, inquiry into the 1996 Exam would not "enlarge the issues" in this litigation concerning the BPD's use of affirmative action. First, while the factual basis for the petitioners' argument appears to be their contention that the 1996 Exam was never considered or relied upon by the City (i.e., the BPD) in making the challenged promotions, Pet. Br. at *3-4, 25*, the defendant City of Boston has disputed that contention.

Moreover, the ultimate question presented by this litigation is whether the action challenged by the petitioners was justified under the governing federal law. The amended complaint seeks injunctive relief against the defendants "as necessary to remedy the violations and to prevent further violations of the Plaintiffs' rights." Petitioners thus seek a judgment that will prevent the BPD from engaging in the type of race-conscious relief that the MAMLEO intervenors assert is either required for the BPD to avoid liability to MAMLEO's members under Title VII or, at the very least, is constitutionally permissible.

There can be no doubt that this lawsuit challenges the BPD's selection procedures, of which the promotional exam and placement of candidates on the eligible list are inseparable components. Thus, inquiry into the validity of the BPD's selection procedures does not constitute an "enlargement of the issues," as petitioners contend. Contrary to the petitioners' arguments, the "discrimination" at issue in this case is not limited to the BPD's alleged act of considering race when making promotions from among candidates with the same score. Rather, any discrimination that might have occurred in the process that resulted in the placement of candidates on the eligible list is necessarily at issue as well. *See United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497, 504 (6th Cir. 1993) ("The subject matter of an action is not limited by the complaint.") (Merritt, C.J., concurring).

In all events, at this stage of the litigation, in which the parties are still engaged in discovery, any conclusions concerning what the BPD did or did not consider when making the challenged promotions are entirely premature.

iii. As a legal matter, even if MAMLEO does seek *to introduce issues and evidence different from that offered by* the original defendants, Rule 24(a)(2) clearly contemplates this. To hold otherwise would be to read the "adequacy of representation" inquiry out of Rule 24(a)(2). *See* Pet. App. 55a-63a (MAMLEO applicants' discussion of the "adequacy of representation" issue).

b. Petitioners' third question is not properly before this Court because it concerns evidentiary and other issues related to the merits of the case, which were neither addressed by the First Circuit in the decision below nor ruled upon by the district court in the first instance, and which do not constitute grounds for denying intervention.

i. Because the petitioners' third question concerns evidentiary and other issues related to the merits of the case, which were not considered by the First Circuit and which have not been ruled upon by the district court, this question is not properly before this Court. *See* Supreme Court Rule 11 and cases cited in section 1b, *supra*.

ii. Petitioners repeatedly misstate the First Circuit's reasons for holding that the MAMLEO intervenors satisfied the standard for intervention as of right – e.g., claiming that the First Circuit allowed intervention based upon MAMLEO's "suggestion that they might challenge the fairness of the Exam," *e.g.*, Pet. Br. at 6-8; or because of MAMLEO's purported "intention to possibly enlarge the issues in the Petitioners' lawsuit," *e.g.*, Pet. Br. at 21. There is no support for these misstatements, which unduly restrict the basis for intervention by the MAMLEO intervenors, both as matter of the expressed intent

of the MAMLEO intervenors, and as a matter of the First Circuit's understanding of that intent.

Far from assuming that the MAMLEO applicants sought intervention solely to challenge (possibly) the 1996 Exam, the First Circuit correctly recognized that the MAMLEO applicants sought to intervene in this action for the much broader purpose of defending the use of racial criteria as a lawful remedial measure under the circumstances presented here. Pet. App. 9a-10a. Thus, even if evidence concerning the 1996 Exam were deemed to be inadmissible, this would not affect the propriety of intervention by the MAMLEO applicants.[1/]

iii. The petitioners repeatedly contend that the MAMLEO intervenors "seek to offer an 'interest' of their own in order to satisfy the compelling governmental interest prong of strict scrutiny on behalf of the governmental actors . . . . in order to circumvent strict scrutiny." *E.g.*, Pet. Br. at 3-4, 9-17. Respondents respectfully submit that eliminating the effects of discrimination constitutes a compelling governmental interest, whether asserted by the government or by a private party, and that the presence of the MAMLEO intervenors in this case does

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[1/]Petitioners' repeated accusations of collusion, *see, e.g.*, Pet. Br. at 7, 13-14, 16, also are baseless, and appear to be rooted in a fundamental misunderstanding about the nature of affirmative action litigation. For example, petitioners seem to argue that collusion and bad faith on the part of the defendants is demonstrated where a defendant acknowledges the existence of discrimination. *See* Pet. Br. at 15-16. It is black-letter law, however, that, in order to justify affirmative action, the defendant must show a "strong basis in evidence" for the defendant's belief that remedial measures were warranted. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality). Thus, the existence of discrimination is simply part of the defendant's defense in a reverse-discrimination case. *Id.* at 274 ("some showing of prior discrimination by the governmental unit involved" is required in order to demonstrate a compelling interest).

not relieve the governmental defendants of their burden to satisfy the requirements of the Fourteenth Amendment.

iv. Petitioners' conclusion that the governmental defendants have no "possibility of meeting the compelling governmental interest requirement of strict scrutiny" Pet. Br. at p.14, is entirely speculative and does not render intervention improper.

v. Finally, this litigation is in the discovery stage and, as such, the defendants' arguments, and the factual bases therefor, in defense of the actions challenged by the petitioners have yet to be fully developed by the defendants, let alone briefed by the defendants, ruled on by the district court, and reviewed by the court of appeals. At this stage, the petitioners' contentions concerning the intentions and litigation strategies of the defendants in this case, as well as their contentions concerning what evidence does and does not exist and what it does or does not prove, constitute speculation, which is inappropriate for review by this Court. *See Thomas v. Union Carbide*, 473 U.S. 568, 579 (1985) ("disputes or questions which involve uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all must not be granted certiorari").

c. Petitioners' question four asks this Court to decide whether an intervenor can introduce "post-enactment evidence" to justify the use of race by a governmental actor. Because this is an evidentiary question that has yet to be decided by district court and reviewed by the court of appeals, it does not warrant certiorari review. *See* Supreme Court Rule 11 and cases cited in section 1b, *supra*.

Clearly, the relevance and admissibility of evidence concerning the examination process is best addressed on the basis of a more complete record after the close of discovery. Moreover, the petitioners argument on the merits reads too much into *Shaw v. Hunt*, 517 U.S. 899 (1996). *Shaw* did not address

the discoverability or admissibility of "post-enactment evidence" but rather the *sufficiency* of such evidence, a question that has not been decided by either the district court or the court of appeals in this case.

Finally, every circuit court that has directly addressed the question of post-enactment evidence has held that it is admissible. *See Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir. 1994); *Contractors Ass'n of Eastern Pennsylvania v. Philadelphia*, 6 F.3d 990 (3d Cir. 1993); *Harrison & Burrowes Bridge Constr., Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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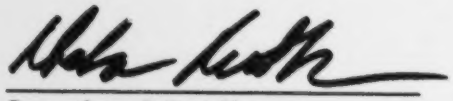
By their attorneys,



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